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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1947

No. 1260

VICA COMPANY (a corporation),
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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To the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Vica Company, petitioner herein, respectfully prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals, Ninth

Circuit, in the case therein numbered 11,206 and entitled: *"Vica Company,* Petitioner, v. *Commissioner of Internal Revenue,* Respondent."

STATEMENT OF MATTER INVOLVED.

The decision which petitioner seeks to have reviewed is a decision of the Circuit Court of Appeals affirming an order of the Tax Court, which dismissed Vica's petition for a review of the action of the Commissioner of Internal Revenue, who had disallowed Vica's claim for refund of processing taxes paid by Vica.

Vica Company, a once prosperous independent California meat packing company, was wrecked and put out of business in June, 1935, by the forced collection by the United States of $330,629 as processing taxes under the Agricultural Adjustment Act. Seven months later this legislation and tax were declared unconstitutional by this Honorable Court. (*U. S. v. Butler,* 297 U.S. 1, 80 L. Ed. 477, 56 S. Ct. 312.)

In an effort to avoid the aforementioned calamitous sacrifice of its valuable properties, Vica had resorted to various futile attempts to procure the funds to pay these illegal taxes, including an unsuccessful effort to borrow these funds from the Reconstruction Finance Corporation. (R. 78.) This failing, Vica then attempted to arrange with the Commissioner so that these taxes could be paid on the installment plan. The Commissioner turned a deaf ear to this plea and proceeded with legal steps to force collection of these

taxes. (R. 83.) The result was that Vica, to save something from the wreck, had to sell its entire business and properties, at a terrific loss, to its long-time competitor, Armour & Company. (R. 95.)

The Revenue Act of 1936 (U.S.C.A., Title 7, Sec. 648) provided a procedure for the refunding of these processing taxes. Pursuant to this legislation, Vica seasonably filed its verified claim for refund with the Commissioner of Internal Revenue (June 30, 1937). (R. 176.) After his disallowance of this claim over four years later (April 17, 1942), petitioner seasonably filed with the Processing Tax Board of Review, a petition for review (July 13, 1942). (R. 4.) Thereafter, and after the Commissioner had filed his answer (R. 41) to Vica's petition (i.e., had responded on the merits), the Commissioner moved the Tax Court (as successor of the Processing Tax Board of Review) on August 24, 1944 for a dismissal of Vica's petition for review on the ground that the refund claim originally filed with the Commissioner was defective and insufficient, and upon the further ground that a hearing would be useless. (R. 49.) The cause had previously been set for trial on the merits. (R. 1.) The Tax Court, on August 14, 1945, entered an order dismissing Vica's petition and denying a hearing on the merits. (R. 125.) That Court expressly ruled that no hearing had ever been held on the merits.

Thereupon, Vica duly filed its petition in the United States Circuit Court of Appeals, Ninth Circuit, to review this decision of the Tax Court. (R. 125.) On

January 20, 1947, the Circuit Court of Appeals affirmed the judgment of the Tax Court (159 F. 2d 148). (R. 224.) It is this judgment of the Circuit Court of Appeals which petitioner seeks to have reviewed by this Honorable Court.

In short, although wrecked and put out of business by this illegal tax, petitioner has not been able, after over nine years of effort, to even secure the hearing on the merits of its claim for refund which Congress intended that it should have. (*Anniston Mfg. Co. v. Davis,* 301 U.S. 337, 57 S. Ct. 816.)

REASONS FOR ISSUANCE OF WRIT.

The writ should be issued, we respectfully submit, because:

I. The decision is on a federal question and is in conflict with applicable decisions of this Honorable Court, and also with decisions of other Circuit Courts of Appeals on the same matter.

II. Justice and due process require that this taxpayer be given, at the very least, a hearing on the merits of its claim for refund.

SUMMARY DISCUSSION OF SAID REASONS.

Preliminarily to a brief amplification of said points, we desire to emphasize the following salient and undisputed facts regarding:

The Refund Claim of Vica Company.

Vica's refund claim (R. 178-209) was filed on the printed form (PT 79) supplied by the Commissioner; it was duly verified; and in this claim Vica Company clearly and positively alleged under oath that:

(1) Vica paid the United States as processing taxes the sum of $330,629.07 (giving specific data as to the amount and date of each tax payment).

(2) *Vica bore the entire burden of said taxes,* and did not shift the burden of said taxes or any part thereof, in any of the ways set forth in the statute or in any other manner.

Detailed allegations covering these essential facts are set forth in said verified claim. In a typewritten "Statement of Facts" attached to the printed form, Vica amplified various of these allegations, and presented much detailed data in support thereof. Various exhibits containing a great deal of specific data were attached to the claim.

In short, except for the absence of the "marginal data" requested in Schedule D of PT 79, Vica's claim *was complete and sufficient in every way.*

The absence of this "marginal data" from the claim was considered by the Tax Court and the Circuit Court of Appeals as a fatal defect. This conclusion is, we respectfully submit, clearly unsound. (Brief p. 14.)

Incidentally, it should be noted that Vica Company did not supply said "marginal data" *because it was impossible for it to do so for several reasons.* Firstly,

its books and records were inadvertently destroyed, *through no fault of Vica,* shortly after it was forced out of business in June, 1935, by this illegal tax. Secondly, it was a small company and its books had not been kept so as to reflect such complicated data. Thirdly, it was forced out of business during the period of this tax and hence *had no post-tax history, which was and is vital to the marginal formula.* (R. 62-65.)

I. THE DECISION IS ON A FEDERAL QUESTION AND IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS HONORABLE COURT, AND ALSO OF OTHER CIRCUIT COURTS OF APPEALS.

(A) On the issue of waiver.

In the Courts below Vica contended:

(1) That its refund claim was adequate and not defective in any way.

(2) That even if there were any defect in the claim, the Commissioner waived his objections thereto by considering this claim on its merits. (It is indisputable that he did, over a period of years, conduct a lengthy investigation of the merits of this claim.)

On the second phase (waiver), the Circuit Court of Appeals concluded:

(a) That Vica had failed to comply with a *statutory condition precedent,*

and

(b) That an express stipulation would be required to effect a waiver of such statutory prerequisite. (See Brief, p. 3.)

Both of said premises of the Court are, we respectfully submit with all due deference, patently erroneous.

Firstly, Vica complied with *every statutory requisite.* Contrary to what the Courts below thought, *there was and is no provision in the Revenue Act of 1936 requiring the marginal data to be incorporated as a part of the refund claim.* The Courts below could not and did not point to any requirement of the statute with which Vica failed to comply. (See Brief p. 14.)

Secondly, if in fact *a statutory condition precedent* to suit had been involved, it could not have been waived by the Commissioner, either impliedly or by express stipulation (*Angelus Milling Co. v. Commissioner*, 325 U.S. 293, 65 Sup. Ct. 1162; see Brief p. 4.)

It being indisputable that the Commissioner did conduct a lengthly investigation of this claim on its merits (Brief p. 11), and no statutory condition precedent being involved, it is clear that the conclusions of the Circuit Court of Appeals on this subject of waiver are unsound and in conflict with the decisions both of the United States Supreme Court and of various other Circuit Courts of Appeals. (Brief p. 6.)

Incidentally, the case of *U. S. v. The Standard Oil Company* (6th C.C.A.), 158 F. (2d) 126, which is relied upon by the Circuit Court of Appeals as the basis for its decision on this issue of "waiver", is,

we respectfully submit, clearly distinguishable. In that case, the statute expressly required the taxpayer *to allege it had borne the burden of the tax and it was conceded that it had failed to allege this. In our case, Vica clearly and specifically alleged all the necessary elements of a proper refund claim.* (Brief p. 21.)

(B) On the subject of the indispensability of the "marginal data".

Both the Tax Court and the Circuit Court of Appeals, in interpreting the provisions of Section 907 of the Revenue Act of 1936 (which deals with subject of "marginal data") (see Appendix, p. i), reasoned that these marginal data were an indispensable part of a refund claim, a *sine qua non;* or, to use the Circuit Court's own language, "a statutory condition precedent," even if the inability to supply such data was in no way imputable to the fault of the refund claimant.

This conclusion of the lower Courts is, we respectfully submit, clearly in error. These "marginal data" were not required by Congress to be a part of the refund *claim*. They were intended by Congress simply as a convenient (but not exclusive) means of *proving* a refund *claim*. In short, they were intended by Congress:

> " * * * to obviate the necessity of strict proof in cases where neither the claimant nor the Commissioner could show directly whether the burden of the tax was or was not borne." (*Commissioner v. Bain Peanut Co.*, C.C.A. 5, 134 F. (2d) 853, 857.)

The reasoning of the Circuit Court of Appeals in our Vica case on this subject of "marginal data", including its assumption that adequate and *complete proof* of a claim must appear *as part of the claim itself,* is directly contrary to the prior decisions both of this Honorable Court, and of various Circuits Courts of Appeals. (See Brief p. 14.)

(C) On the point that a hearing on the merits of the Vica claim would be useless.

One of the two grounds urged by the Commissioner in support of his motion for a dismissal in the Tax Court was that if a hearing were to be had, Vica would be limited to the proof of facts set forth in its refund claim, and would be limited to the evidence already produced before the Commissioner. The Commissioner contended further that such facts and such evidence would not be sufficient to prove the claim, and hence a hearing on the merits would be useless. The Courts below agreed with this contention.

These contentions of the Commissioner and the lower Courts concurrence therewith were and are, we respectfully submit, unsound.

In the first place, if Vica proved at such hearing *the facts* which it clearly and positively *alleged* under oath in its claim, it would be entitled to a full allowance of this claim. (Brief, p. 21.)

Secondly, it would not, at such hearing, be confined to the evidence produced before the Commissioner. (Brief, p. 22.)

Furthermore, even if the law were that Vica would be limited to the evidence produced before the Commissioner, it was, at the very least, entitled to a plenary administrative hearing before the Board on the merits and effect of this evidence, and to judicial review by a Court of the legal issues arising at such administrative hearing. Due process requires at least this much. (*Anniston Mfg. Co. v. Davis,* 301 U.S. 337.)

Incidentally, we believe that it is correct to state that the evidence produced by Vica Company before the Commissioner in support of this claim *was and is sufficient to prove its claim and to entitle it to a full allowance of this claim.* That evidence showed that it bore the full burden of this tax to an extremely harsh degree; *the tax wrecked the company.* (Appendix, p. viii.)

II. JUSTICE AND DUE PROCESS REQUIRE THAT THIS TAXPAYER BE GIVEN, AT THE VERY LEAST, A HEARING ON THE MERITS OF ITS CLAIM FOR REFUND.

It is indisputable that the forced collection of this illegal tax forced Vica Company out of business in June 1935, at great sacrifice of its valuable assets and with a huge loss to its stockholders. (R. 76-95.)

Likewise indisputable is the fact that Vica Company has made every effort, in good faith, to duly comply with the provisions of the 1936 refund legislation. It seasonably filed its claim on the form provided by the Commissioner, and, over a period of four years, supplied the Commissioner with much

evidence and data to support this claim. It thereafter duly filed its petition for review as provided in the 1936 refund legislation.

Having done this, the very least to which Vica Company is entitled, we respectfully submit, is a full hearing on the merits of its claim. (*Anniston Mfg. Co. v. Davis*, 301 U. S. 337.)

CONCLUSION.

Vica Company turns to this Honorable Court as its last hope in its long struggle for justice. Every principle of law and equity justifies, we respectfully submit, its request for a hearing on the merits. And, in this connection, it should be noted that this Honorable Court has on various occasions emphasized that these tax refund proceedings are equitable in nature:

> "The present contention is particularly faulty in that it overlooks the fact that the statutes providing for refunds and for suits on claims therefor proceed on the same equitable principles that underlie an action in assumpsit for money had and received. Of such an action it rightly has been said: 'This is often called an equitable action and less restricted and fettered by technical rules and formalities than any other form of action. It aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which ex aequo et bono belongs to the plaintiff.' " (*U. S. v. Jefferson Electric Co.*, 291 U.S. 336, at 402; 78 L.Ed. 859; *Anniston Mfg. Co. v. Davis*, 301 U.S. 337, 350.)

"It is frequently said that relief or remedial provisions must be liberally construed to effectuate the objectives sought." (Mertens, Law of Federal Income Taxation, Vol. 1, p. 71, Sec. 3.09.)

"The courts have repeatedly held as a general rule that in cases of ambiguity doubts should be resolved in favor of the taxpayer." (Id. p. 64, Sec. 3.05.)

"Laws in respect of taxation should be construed and applied with a view to avoiding, so far as possible, unjust and oppressive consequences." (Id. p. 62, Sec. 3.05.)

Is it not an extremely harsh and palpably inequitable result, your Honors, to deny Vica Company a hearing on the merits, by resort to the extreme and unsound technicalities erroneously relied upon in the Courts below?

Such a result, and the premises resorted to by the Courts below in attempted justification of this result, directly contravene the prior decisions of this Honorable Court and of various other Circuits Courts of Appeals. Furthermore, unless this Honorable Court intervenes herein, the decision below will stand as a very confusing and misleading authority in this important field of law dealing with tax refund procedure.

Dated, San Francisco, California,
April 14, 1947.

Respectfully submitted,
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (January 20, 1947) is reported at 159 F. (2d) 148. It is printed in full in the Transcript of Record. (R. 224.)

The opinion of the Tax Court (July 31, 1945) is reported at 5 TC 535. It is printed in full in the Transcript of Record. (R. 110.)

JURISDICTION.

This being a final decision of the Circuit Court of Appeals, the Supreme Court has jurisdiction to review it under Judicial Code Sec. 240, as amended. (28 U.S.C.A. No. 347.) Furthermore, the Revenue Act of 1936 provides that any decision of a Circuit Court of Appeals in proceedings to recover processing taxes is subject to review by the Supreme Court. (U.S.C.A., Title 7, No. 648(g).)

The decision of the Circuit Court of Appeals was entered on January 20, 1947, hence this present petition for certiorari is timely and within the three months limit provided by law.

ASSIGNMENTS OF ERROR.

Petitioner contends that the judgment of the Circuit Court of Appeals, affirming the dismissal of this proceeding by the Tax Court without a hearing on the merits, was and is erroneous because:

1. The original claim of refund filed by petitioner with the Commissioner in 1937 was sufficient in form and content to satisfy the requirements of the Revenue Act of 1936, and to confer jurisdiction and impose the duty upon the Commissioner and the Processing Tax Board of Review (and its successor, the Tax Court), to hear and determine this claim upon its merits.

2. The theory and holding of the Courts below that such a claim, in order to be sufficient to confer jurisdiction and to comply with the statute,

must contain on its face and as a part thereof, a factual showing by way of "marginal data" sufficient to prove that the claimant bore the burden of such processing taxes, was and is unsound, and is not in accord with controlling law.

3. The Commissioner of Internal Revenue, by receiving from claimant much evidence, documentary and otherwise, with respect to the merits of this claim, waived any objections to the form of said claim, or any alleged technical defects therein. He is estopped from belatedly invoking a dismissal of said proceeding because of said alleged technical defects in the claim.

4. Petitioner was given, by the aforementioned processing tax refund legislation, a right to a hearing on the merits of its claim, and, under the admitted facts in this case, the judgment of the Court below, affirming a dismissal without such a hearing, was unfair and a denial to petitioner of due process of law.

ARGUMENT OF POINTS PRESENTED IN PETITION FOR WRIT OF CERTIORARI.

(A) WAIVER.

The reasoning of the Circuit Court of Appeals herein on this point of "waiver" is as follows:

> "Here the Commissioner's alleged waiver would have been an attempted abandonment of an absolute defense to the claim, and the decisions are numerous emphasizing that *conditions precedent to suit prescribed by statute,* cannot, at least without proper stipulation, be waived by the Commis-

sioner but must be complied with strictly." (159 F. (2d) at 151.) (Italics ours.)

"The claimant wholly failed to comply with the formal conditions of the statute relative thereto." (159 F. (2d) at 150.)

This reasoning is, we respectfully submit, clearly illogical and self-contradictory; as well as factually unsupported.

It is illogical and self-contradictory because *if* the statute had prescribed a condition precedent as a prerequisite of this refund claims, such a statutory prerequisite could not have been waived by the Commissioner:

"In so far as Congress has made explicit statutory requirements, they must be observed and are beyond the dispensing power of Treasury officials." (*Angelus Milling Company v. Commissioner,* 325 U.S. 293, at 295.)

Furthermore, said reasoning of the Court is factually unsupported because *it is not true that Vica failed to comply with the provisions of the 1936 statute governing this matter. Every statutory condition was complied with by Vica.* It is significant that the lower Court wholly failed to call attention to any provision or provisions of this statute with which Vica allegedly failed to comply.

Underlying all of the Court's reasoning in this case, is its assumption that this 1936 legislation required that such a refund claim contain the "marginal data"

mentioned in Section 907 of the Act. The fallacy of this assumption is pointed out in detail hereinafter. (p. 14, infra.)

Incidentally, this Honorable Court in the *Angelus* case, in passing upon substantially the same point, stated:

> "We conclude that there is nothing in what Congress has explicitly commanded to bar the claim." (325 U.S. at 296.)

Said pronouncement of this Honorable Court well epitomizes the situation in our case. Neither the respondent nor the Courts below have pointed to any language in the Revenue Act of 1936, either explicit or otherwise, which bars Vica's claim.

The very most which could possibly be asserted in this Vica case would be that the Vica refund claim failed to comply with the Commissioner's *regulations* because it failed to contain the "marginal data." We do not concede that Vica's claim is open to any criticism on this score because it was impossible for Vica to supply such data. (R. 62-65.) However, assuming, for sake of argument, that the failure to incorporate these marginal data in the claim left the claim defective in that it did not fully comply with *the regulations of the Commissioner,* it is well settled that such a defect could be (and would be) waived by the Commissioner by considering the claim on its merits:

> "Treasury Regulations are calculated to avoid dilatory, careless, and wasteful fiscal administra-

> tion by barring incomplete or confusing claims * * * But Congress has given the Treasury this rule-making power for self-protection and not for self-imprisonment. If the Commissioner chooses not to stand on his own formal or detailed requirements, it would be making an empty abstraction, and not a practical safeguard, of a regulation to allow the Commissioner to invoke technical objections after he has investigated the merits of a claim and taken action upon it. Even tax administration does not as a matter of principle preclude consideration of fairness." (*Angelus Milling Co. v. Commissioner,* 325 U.S. at 296.)

The conclusion of the lower Court that such an alleged defect could not be waived by *the conduct* of the Commissioner in considering the claim on its merits and that it would require an express stipulation to effect such a waiver is, therefore, clearly in conflict with the recent decision of this Honorable Court in the *Angelus Milling Company* case, supra.

It likewise directly contravenes various earlier decisions of this Honorable Court:

Tucker v. Alexander, 275 U.S. 228, 72 L. ed. 253;

Bonwit Teller Co. v. U. S., 283 U.S. 258, 75 L. ed. 1018;

U. S. v. Memphis Cotton Oil Co., 288 U.S. 62.

Tucker v. Alexander, supra, a leading authority on this subject of waiver, was an action by a taxpayer to recover income taxes. One of the questions was whether or not the claimant had filed a sufficient claim

with the Commissioner. The controlling regulation (Article 1036 of Treasury Regulations) contained a provision (similar to that in the 1936 Processing Tax Refund Act) that "all facts relied upon in support of the claim shall be set forth clearly under oath." In this *Tucker* case, the claimant had not complied with this requirement. The U. S. Supreme Court pointed out that, in construing and applying such requirements, it should always be borne in mind that said provisions and regulations are adopted to assist the administrative officers in the discharge of their duties in passing upon tax refund claims, and can be waived by them:

> "The statute and regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery. If compliance is insisted upon, dismissal of the suit may be followed by a new claim for refund and another suit within the period of limitations. If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the government, and decidedly in the interest of an orderly administrative procedure, that the claim shall be disposed of upon its merits on the first trial without imposing upon the government and taxpayer the necessity of further legal proceedings. We can perceive no valid reason why the requirement of the regulations may not be waived for that purpose. We are not unmindful of those cases holding that in suits

against the government no officer of the government may waive statutes of limitations. *Finn v. United States,* 123 U.S. 227. Such waivers, if allowed, would defeat the only purpose of the statute and impose a liability upon the United States which therein would not exist—consequences which would not attach to the waiver here." (275 U.S. at 231.)

In *Bonwit Teller Co. v. U. S.,* supra, the Supreme Court reversed a judgment of the Court of Claims disallowing a refund because the claim filed with the Commissioner was too informal. The Supreme Court stated:

> "The Commissioner, within the time allowed, was advised of the grounds on which plaintiff's right to refund rested, *and was not misled or deceived by plaintiff's failure to file a formal claim,* and was fully warranted in holding that the waiver and earlier documents were sufficient." (Italics ours.)

In *U. S. v. Memphis Cotton Oil Company,* supra, the U. S. Supreme Court, in again applying this rule of waiver, held that the Commissioner, by making audits and other investigations with respect to the merits of the claim, had waived any objection to the admittedly defective and informal claim. The Court drew an analogy to the modern attitude of Courts with respect to the rules of pleading in a lawsuit. Technicalities and other matters of form which do not seriously mislead a party are readily overlooked, and may be easily waived. So too, says the Supreme Court,

regarding the rules and regulations with respect to the form of tax refund claims. The Court again emphasizes that if a claim is so vague or indefinite as to leave the Commissioner in the dark as to its essential grounds and purport, he can readly protect himself *and the claimant,* by promptly rejecting it:

> "The function of the regulation is to facilitate research. The Commissioner has the remedy in his own hands if the claim as presented is so indefinite as to cause embarrassment to him or to others in his bureau. He may disallow the claim promptly for a departure from the rule." (288 U.S. at 71.)

Bethlehem Baking Co. v. U. S. (C.C.A.-3), 129 F. (2d) 490, is a helpful authority in this connection because it not only involved refunds of floor taxes paid under the A.A.A. but also involves this very question of "waiver," viz.:

> "Moreover, as we have already pointed out, the Commissioner made no objection to the absence of an oath but responded to the merit of the evidence submitted. The examination and consideration of the claim on its merits constituted a waiver by the Commissioner of any objection as to the submission." (129 F. (2d) at 493.)

The extent to which the Courts have gone in sustaining defective refund claims is well illustrated by *Samara v. U. S.* (C.C.A.-2), 129 F. (2d) 594. In that case, the Commissioner moved to dismiss a proceeding to recover cotton taxes collected under the A.A.A. He based his motion on the ground that the claim for

refund was insufficient and defective. In ruling against the Commissioner on this point, the Circuit Court of Appeals stated:

> "The trial court's opinion reasons that Section 903 requires the claimant to set forth under oath the evidence relied upon in support of his claim, and since the present claim did not meet this requirement 'the Commissioner was without jurisdiction to consider the claim on the merits.' With this view we are unable to agree. The defect in form resulting merely from failure to comply with paragraphs 6 and 7 of the instructions, compliance with which was made compulsory by Article 201 of the Regulations, *was not jurisdictional* and could be waived by the Commissioner." (129 F. (2d), at p. 596.) (Italics ours.)

> "On the issue of who bore the burden of the tax the claim at bar was not wholly unsupported by the evidence. *There was evidence that claimant paid the tax and his affidavit that he had not shifted the burden to another.* So we think that the statutory requirement that 'all evidence relied upon' be set forth was met and that any defect in form of the claim resulted from failure to observe the regulations, a defect which could be waived." (129 F. (2d) at 597.) (Italics ours.)

And yet, in our case, where Vica not only filed a detailed claim but also voluminous data and evidence to support it, the lower Courts were of the view that the doctrine of "waiver" could not legally apply.

The record herein indisputably shows that the Commissioner did consider Vica's claim on its merits.

The record shows, without refutation, that over a period of several years after Vica filed its refund claim with the Commissioner in 1937, he conducted a lengthy investigation of this case on its merits, both in Washington, and in the field at San Francisco. (R. 56-59; 103-108.) In this investigation, Vica Company and its accountants, officers and attorneys threw open to the Commissioner all available records of the company and submitted to him much evidence and data, *all bearing solely on the merits of this claim.* These agents of the company spent many hours and days with the representatives of the Commissioner in conferences concerning the merits of this claim.

For example, the accountants for Vica Company (Messrs. Bearwald & Renz) spent many days compiling facts and data and reports which were submitted in written form to the Commissioner at San Francisco as evidence in support of this claim. (R. 104.) Exhaustive exhibits were thus prepared and delivered to the Commissioner. (R. 107.)

Furthermore, the Commissioner's own correspondence with Vica Company plainly shows that he intended to consider, and was considering this claim on its merits. For example, under date of September 23, 1938, he wrote Vica Company that he was referring this claim to his field agents for the taking of evidence with respect thereto:

> "The claims are being referred to the office of the Internal Revenue Agent in Charge, 433 Fed-

> eral Office Building, Civic Center, San Francisco, California. *The evidence required in support of the claims should be forwarded to that office* * * *." (R. 149.) (Italics ours.)

Previously to this, the Commissioner had written Vica, under date of April 19, 1938, that if the additional evidence previously requested by him was not furnished within thirty days from the date of said letter,

> "* * * it will be necessary to proceed with the adjustment of the claim on the basis of the evidence on file." (R. 141.)

Obviously, if the Commissioner had then considered Vica's claim to be so defective as not to give him jurisdiction to entertain it, he would not have (and should not have) proceeded to conduct a hearing in the field with respect to the merits of this claim, or to notify Vica that he intended *to adjust the claim on the basis of evidence on file.* As the Supreme Court has pointed out in some of the cases cited in an earlier portion of this brief, the Commissioner should have promptly rejected the claim if he considered it so defective in form as to be embarrassing or confusing to him.

The truth is that there was not a single phase of Vica's claim that was at all confusing or obscure to the Commissioner. He knew (as did all other persons having any contact with this claim) that *the claim* was clear and explicit, and that, in so far as its merits were concerned, the whole matter simmered down to a single *factual* issue:

"Did or did not Vica Company bear the burden of the processing taxes?"

It was to this factual matter that the parties addressed their attention over a period of years after this claim was filed and it was with respect to this vital factual issue that Vica presented to the Commissioner much data and evidence during the long period that this claim was being considered by him on its merits.

Having thus considered this claim on its merits, the Commissioner will be deemed, under the authorities hereinabove cited, to have waived any objection to the form of this claim. To permit the Commissioner to now belatedly block a hearing of this matter on its merits by the Tax Court because of an alleged formal defect in the original claim, would not only contravene the settled law of "waiver" established by the aforementioned decisions of this Honorable Court but would likewise, under the circumstances of this case, palpably offend elementary principles of justice and fair play.

Incidentally, it might be noted, in passing from this phase, that the undisputed facts in this case clearly satisfy the following criteria recently enunciated by this Honorable Court in the *Angelus Milling Company* case, supra, viz.:

"The showing should be unmistakable that the Commissioner has in fact seen fit to dispense with his formal requirements and to examine the merits of the claim. It is not enough that in some roundabout way the facts supporting the claim

may have reached him. The Commissioner's attention should have been focused on the merits of the particular dispute. The evidence should be clear that the Commissioner understood the specific claim that was made even though there was a departure from form in its submission * * *" (325 U.S. at 297.)

(B) THE CONCLUSION OF THE CIRCUIT COURT OF APPEALS THAT THESE "MARGINAL DATA" WERE AN INDISPENSABLE PART OF THE REFUND CLAIM IS CONTRARY NOT ONLY TO THE PLAIN WORDING OF THE REVENUE ACT OF 1936, BUT ALSO TO THE PRIOR DECISIONS OF THIS HONORABLE COURT AND OF VARIOUS OTHER CIRCUIT COURTS OF APPEALS.

Both the Tax Court and the Circuit Court of Appeals, in interpreting the provisions of the Revenue Act of 1936 on the subject of "marginal data" (Section 907, see Appendix p. i) considered that the absence of these marginal data from the Vica claim was a fatal defect therein. This conclusion is, we respectfully submit, plainly erroneous.

There is nothing in this refund legislation which says or requires that these marginal data be included *as a part of the refund claim.* It is submitted that a mere reading of the pertinent provisions of this statute will show that these statutory "marginal" provisions deal solely with the *proof* of a refund claim, and not with the contents of the claim itself.

The statute (Sec. 903) simply provides that in order to obtain a refund, the claimant must file *a claim* for refund, in accordance with the Treasury regulations.

It does *not* state that *the evidence* in support of such *claim* must be incorporated *as a part of the claim.* The further provisions of the statute, to the effect that the evidence relied upon in support of such a claim must be set forth clearly under oath, do not mean or require that such evidence must be incorporated in *the claim.*

Furthermore, a consideration of the complicated nature of the evidentiary matters which normally are (and must be) used to prove such claims will show the utter impracticability of incorporating such data *as a part of the claim.* As the authorities hereinafter reviewed show, the intent of Congress was that *after* such a claim is filed with the Commissioner, the claimant should be, and is, privileged *to prove* and substantiate the claim by any and all types of competent evidence he can produce.

In other words, this 1936 tax refund legislation simply intended and required that the conventional and orthodox procedure which governs other tax refund claims (as well as all litigation in Courts of law) should be followed. The moving party (refund claimant) is first required to file *his claim,* and thereafter to proceed to try to substantiate the *allegations* thereof with proper *evidence.*

Furthermore, the Commissioner's own regulations and his instructions to tax refund claimants clearly show that the orthodox procedure of first filing a claim and then of proceeding to attempt to prove it, governs and controls these proceedings for refunding of processing taxes. These regulations and instructions

expressly provide that the claimant may PROVE *the facts of his claim* "in any manner available to him" and may "submit such evidence to that end as he may desire."

The Commissioner's instructions to tax claimants (see P.T. Form 79, Sec. 7) clearly confirms the foregoing. They provide, *inter alia,* that:

> "Facts and evidence.—(a) The Claimant shall set forth in his claim in detail *each ground* upon which the refund is claimed. It is incumbent upon the claimant to prepare a true and complete claim and to present and substantiate by clear and convincing evidence all the facts *necessary to establish his claim* to the satisfaction of the Commissioner. * * * The claimant is required to set forth clearly *the facts of his claim* and is privileged *to prove* those facts in any manner available to him and to submit such evidence to that end as he may desire."

This Honorable Court made it very plain in *Aniston Mfg. Co. v. Davis,* 301 U.S. 337, that these provisions of the 1936 Revenue Act deal purely with the question of the *evidence* necessary *to prove a claim,* and also pointed out that a claimant is not restricted to this type of proof:

> "Section 907 established *certain rules of evidence* or presumptions to be observed in the administrative proceeding." (301 U.S. at 341.) (Italics ours.)

> "In the light of the context, and of the entire scheme of the administrative proceeding, we are of the opinion that the provision was intended to afford, and does afford, full opportunity to the

> claimant to present any evidence which may be pertinent to the questions to be determined by the Board of Review and which may be appropriate to overcome any presumption which might be indulged either under Sec. 907(a) or otherwise." (301 U.S. at 355.)

It is this hearing on the merits which Vica seeks; this opportunity to present, in a plenary hearing, all of its evidence to prove the allegation of its claim that it did bear the entire burden of this onerous tax.

The aforementioned reasoning and conclusion of the Circuit Court of Appeals in our case is also plainly in conflict with the following decisions of other Circuit Courts of Appeals. These decisions show that this "marginal data and presumption formula" incorporated in the 1936 refund legislation pertain to the *proof of a claim* and not *the claim itself;* that they were intended by Congress simply as a rough means of proving a probable case and of obviating the necessity of strict PROOF; and that they are not at all a necessary or indispensable part of the refund claim itself:

Cornett-Lewis Coal Co. v. Commissioner (CCA-6), 141 F. (2d) 1000;

C. B. Cones & Son Mfg. Co. v. U. S. (C.C.A.-7), 123 F. (2d) 530;

E. Regensburg & Sons v. Helvering (C.C.A.-2), 130 F. (2d) 507;

Epstein v. Helvering (C.C.A.-4), 120 F. (2d) 427;

Arkwright Mills v. Commissioner (C.C.A.-4), 127 F. (2d) 465.

In *Cornett-Lewis Coal Company v. Commissioner,* supra, the Circuit Court of Appeals (6th Circuit), in reversing a judgment of the Tax Court, stressed the purely *prima facie* nature of this "marginal formula", and emphasized that the taxpayer should be given the opportunity to present *any* evidence relative to the issue of who bore the burden of the tax.

Cones & Son Mfg. Co. v. U. S., supra, resembles our case because of the complexity of the accounting and other practical problems involved. The Circuit Court of Appeals (7th Circuit) therein reversed the judgment of the lower Court and ordered a refund to the taxpayer, even though it was admitted that the taxpayer actually increased the market price of its cloth and other cotton products after this tax went into effect.

In *Commissioner v. Bain Peanut Co.* (C.C.A.-5), 134 F. (2d) 853, the Court well stated the true purpose of, and limits upon, this "marginal formula" in the 1936 statute, viz.:

> "The presumption obviously was created in recognition of the difficulty attendant upon proving the extent of the tax burden either borne or shifted, since no reason existed, at the time the tax was levied, for believing that recording such information might be of future benefit. *We think the plain purpose of Congress in creating the presumption was to obviate the necessity of strict proof in cases where neither the claimant nor the Commissioner could show directly whether the burden of the tax was or was not borne.* If no proof was available and if presumed margin of

gross profit of the claimant was lower during the tax period than otherwise, the probability existed that he bore the burden of the tax; likewise, if the presumed margin was not lower during the tax period, it was reasonable to assume that the tax burden was shifted." (At p. 857.) (Italics ours.)

In *Epstein v. Helvering*, supra, the Court again made it very clear that the "marginal showing" mentioned in the statute is not at all controlling, and that the tax claimant is privileged to prove and sustain his claim *by any evidence which may be available for said purpose.* In reversing the Processing Tax Board and ordering judgment for the claimant in the full amount claimed, the Circuit Court of Appeals in that case clearly pointed out the erroneous nature of any view that this "marginal data" is controlling:

"It is evident that the Board felt itself bound to accept the prima facie presumption as controlling * * *.

We do not think that this decision should be sustained in view of the Board's findings. It gave too great weight to the marginal method required by section 907 (a), (b) and (c), and too little weight to proof of the actual facts permitted by section 907(e) of the Act * * *.

Such an application of Section 907(e) of the act is not in accord with the interpretation given by the Supreme Court of the United States in order not only to protect the rights of the government and of the taxpayer under the statute, but also to meet the charge of unconstitutionality." (120 F. (2d) at 431.)

It is indisputable in our case that Vica Company did not have available any *pork* "marginal data" and hence was unable to supply any such "marginal proof." (R. 62-65.) Therefore, it is clear, under the aforementioned authorities, that Vica was privileged to prove its claim by *any* evidence which would indicate, not necessarily to a certainty but merely *"with some degree of probability,"* that it bore the burden of this tax.

When judged and appraised by the fair and liberal standards enunciated in the foregoing authorities, the case presented by Vica Company to the Commissioner went far beyond the realm of probabilities. Its evidence was and is sufficient, we respectfully submit, to convince any fair-minded person that the company unquestionably did bear the burden of this tax; and bore it to an extremely harsh degree; this illegal tax indubitably wrecked this company, and forced it out of business. (See Appendix, p. viii.)

(C) THE CONCLUSION OF THE CIRCUIT COURT OF APPEALS THAT A HEARING WOULD BE USELESS BECAUSE PROOF OF THE FACTS ALLEGED IN VICA'S CLAIM WOULD NOT ENTITLE IT TO AN ALLOWANCE IS PALPABLY IN ERROR.

The Tax Court here took the erroneous position that proof of the facts alleged in the Vica Claim would not in any event entitle it to a recovery herein and that therefore a hearing would be useless. (R. 121.)

The Circuit Court of Appeals apparently concurred in this view, although its opinion does no more

than quote with approval the opinion of the Tax Court on this phase.

This conclusion is, we respectfully submit, unsound.

Proof of the facts *alleged* in the Vica claim would entitle it to full recovery. *That claim alleged all the necessary facts to entitle Vica to full allowance of its claim.* The very first page of this claim (R. 179) contains a sufficient *allegation of facts* and statement of grounds of this claim to, in and of itself, fully satisfy such requirements. On that page Vica Company alleges, under oath:

(1) That it paid the U. S. $330,629.07 as processing taxes on hogs.

(2) That it claims this amount as a refund.

(3) That it bore the entire burden of these taxes.

(4) That it had not passed on any of this tax to vendees and later reimbursed the vendees.

(5) That (now we quote verbatim from this first page):

> "That the amount of the burden of the processing tax on the processing of the commodity named above which was borne by the claimant as set forth in column 2 above is true and correct; that the claimant has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article processed

> from such commodity; (2) through reduction of the price paid for such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, or reimbursed therefor, or may shift the burden thereof; and (b) that the data and statements submitted in and made a part of Schedule D are true and correct; * * *"

Proof of these facts *would, of course, entitle Vica to complete allowance of this claim.* The remainder of Vica's claim contained many additional detailed allegations in support of this claim.

Therefore, the conclusion of the Courts below that proof of the facts alleged in Vica's claim would not entitle it to an allowance of the claim is, we respectfully submit, plainly unfounded.

Likewise erroneous, we respectfully submit, is the holding below that at a hearing on the merits Vica would be limited to the evidence produced before the Commissioner. Said conclusion below is both irrelevant and unsound. It is irrelevant because, assuming that the evidence would be so limited, Vica would at least be entitled to an opportunity to present to the administrative board set up by this statute, in a plenary hearing, the same evidence and data presented to the Commissioner. Due process requires at least this. (*Anniston Mfg. Co. v. Davis,* 301 U. S. 377.)

Moreover, said conclusion of the lower Courts is legally untenable:

Bethlehem Baking Co. v. U. S. (C.C.A.-3), 129 F. (2d) 490;

Hutzler Bros. Co. v. U. S. (D.C. Maryland), 33 Fed. Supp. 801;

Bullocks, Inc. v. U. S. (D.C. Calif.), 43 Fed. Supp. 861.

In the *Bethlehem Baking Co.* case, supra, the Circuit Court of Appeals, after reviewing decisions of the United States Supreme Court, summed up the controlling principle of law as follows:

> "While it is the duty of a claimant to present a formal claim and to endeavor by sufficient proof to satisfy the Commissioner as to its merit, he should not be barred from presenting further evidence in support of the same claim in a suit for refund after rejection by the Commissioner."

> "In § 903 of the Revenue Act of 1936 there is the additional provision that "All evidence relied upon in support of such claim shall be clearly set forth under oath.' These words did not appear in the Revenue Act of 1928, which was the subject matter of construction in the Jefferson Electric case, supra. Was the requirement in § 903 intended to impart finality to the decisions of the Commissioner with respect to claims for refund by limiting the evidence in support thereof, upon suit, to that submited to the Commissioner or by withdrawing jurisdiction from the Courts in such regard because the Commissioner was not satisfied that all evidence relied upon in support of the claim had been clearly set forth under oath? We think not."

CONCLUSION.

For the reasons hereinabove reviewed the decision sought to be reversed herein is fundamentally in conflict with the earlier decisions of this Honorable Court, and also of various other Circuit Courts of Appeals. It is a dangerous and confusing precedent.

The review and reversal of this decision will not only eliminate this unsound and confusing decision but will also accomplish justice by giving this taxpayer the opportunity to substantiate, by competent evidence, its refund claim; an opportunity which Congress intended it should have.

Dated, San Francisco, California,
April 14, 1947.

Respectfully submitted,
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(Appendix Follows.)

Appendix

Section 907. Evidence and presumptions.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

Tax period.

(1) The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed

during such month, and the resulting figure shall be the margin for the month.

Period before and after the tax.

(2) The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

Average margin.

(3) The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

Combination of commodities.

(4) Where, as, for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such com-

modities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

Cost of commodity.

(5) The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

Gross sales value of articles.

(6) The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfactory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of articles or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of

sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was paid or collected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima facie evidence that such amount was not borne by the claimant but

that it was shifted to others. June 22, 1936, 9:00 p. m., c. 690, Section 907, 49 Stat. 1751." (U.S.C.A., Title 7, § 649.)

Filing of Claims.

The pertinent provisions of the Revenue Act of 1936 with respect to such claims are as follows:

"§ 903. *Filing of Claims:* No refund shall be made or allowed of any amount paid by or collected from any person as tax under this chapter unless, after June 22, 1936, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. * * * (*U. S. C. A.*, Title 7, § 645.)

§ 902. *Conditions on allowance of refunds*: No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under this chapter, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 648 of this title, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or hav-

ing control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of this chapter, or in the price of any article processed from any commodity with respect to which a tax was imposed under this chapter, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever." (*U.S.C.A.*, Title 7, § 644.)

BRIEF REVIEW OF THE FACTS AND EVIDENCE PRESENTED TO THE COMMISSIONER BY VICA COMPANY ON THE MERITS OF ITS REFUND CLAIM.

To entitle itself to a refund of these processing taxes it was incumbent upon Vica Company to allege and prove three things:

1. That it paid the United States a certain sum as processing taxes under the A.A.A.

2. That it was a first processor, and hence obligated to pay these taxes, and, as such processor, qualified to seek a refund thereof.

3. That it bore the burden of these taxes thus paid by it, and did not pass on said burden to others.

As to the first two essentials above set forth, Vica's case was and is crystal clear. Its claim clearly sets forth the amount of processing taxes paid by it, with the respective dates and amounts of the various tax installment payments clearly scheduled. The Commissioner has not disputed, and cannot dispute, these allegations, and this data.

Likewise, the Commissioner has not disputed, and cannot dispute, the fact that Vica Company was a first processor and therefore liable for these taxes, and also qualified to seek a refund thereof. There have been various cases, of course, where the claimant, even though he paid the processing taxes was not the first processor and hence was not qualified to seek a refund thereof. (*Arabi Packing Co. v. Commissioner* (CCA-5), 109 F. (2d) 278.) The Vica case is not such a case. Admittedly, Vica was and is entitled and qualified to seek a refund of these taxes.

Therefore, this entire case boils down to the single issue as to whether or not Vica bore the burden of these processing taxes.

Facts and Evidence Presented by Vica to the Commissioner to Show That it Bore the Burden of This Tax.

The following is a summary statement of the facts clearly proved to the Commissioner by the array of undisputed evidence presented to him by Vica Company during the several years that this claim was pending before him.

Vica Company was for many years prior to 1935 (when it was forced out of business by this tax) one of the leading and successful independent meat packing companies on the Pacific Coast. It maintained a large slaughterhouse at San Francisco, and branches at various points in the State of California. In the principal area served by it (Northern and Central California) Vica provided the chief competition for the national packing firms of Armour & Company and Swift & Company, who also operated in said area. Throughout its long period of operation prior to 1935, Vica Company (then operating under the name of Virden Packing Company) had built up around its products (hams, bacons, etc.) various valuable trademarks and trade names and much goodwill. (R. 83.) It was essentially a home owned company, its stockholders consisting in the main of many hundreds of small stockholders, many of whom were farmers and ranchers from whom it purchased its hog and cattle requirements.

Like all such companies, Vica was hard hit by the national depression precipitated in 1929, and continuing for a number of years thereafter. However, it managed to survive those troublesome times in

fairly good financial shape, and entered the year 1933 with its plant and properties free and clear of encumbrances, with a substantial inventory of pork and other products, and with ample banking credits to enable it to carry on its day-by-day operations. (R. 102.)

Then came the various recovery programs instituted in 1933 by the national administration (N.R.A., AAA., etc.). Vica loyally and actively supported the N.R.A., and took on its share of the load incident to this program. Although its then business did not so warrant, it immediately increased the number of its employees from 225 to 265 in response to President Roosevelt's appeal. It fought for a meat packer's code, and supported Secretary Henry Wallace's efforts to create conditions in the packing industry whereby fair competition would displace the unethical and cut-throat marketing practices then being indulged in by the national packers in their efforts to stamp out the small independent packers such as Vica. In fact, Vica was the most active supporter, among the independent packers in the entire West, of these programs. It went so far as to resign its membership in the Institute of American Meat Packers because of the failure of that organization to meet the wishes and desires of the federal government for a code to govern meat packers. (R. 81.)

One result of all of this loyal support and activity by Vica was that the competition from the national packers which confronted it all during this tax period in the sale of its pork products was so intense

and cutthroat that Vica continuously lost money during these years in its pork department. The facts with respect to this phase are set forth in the affidavit of Vica's President, Mr. L. L. James, who was in active charge of its business all during this period:

> "All during the years 1933, 1934 and that portion of the year 1935 in which Vica operated, Vica Company was confronted, in the purchase of its hogs and the sale of its pork products, with intense and active day-by-day, and hour-by-hour competition, principally from two national packing companies, Swift & Company, and Armour & Company, both of which operated, during this tax period, in the area covered by Vica's business. During the years 1931, 1932 and 1933, these national packing companies, with their huge financial resources and ample storage facilities for pork and pork products, were able to, and did, purchase millions of dollars worth of hogs at depressed prices, generally ranging in the neighborhood of three to four cents per pound, liveweight. These companies were able to, and did, sell many of the products processed from this cheap pork, during the processing tax period from 1933 to 1935, in active competition with Vica Company, at prices substantially below Vica's then cost of production.
>
> The N.R.A., which Vica Company loyally supported, and its concomitant programs, including the hog extermination compaign of the United States Government, had the effect of greatly increasing the price which Vica had to pay in 1934 and 1935 to the farmers for its supplies of

hogs. As a result, the pork products which Vica Company thus sold during said tax period, in competition with the aforementioned 'cheap' pork products of its national competitors, cost Vica Company anywhere from nine cents to twelve cents per pound, liveweight, as contrasted with the three to four cents depression cost to the national packers.

Furthermore, as a result of the N.R.A. and the other contemporaneous phases of the national recovery program, including the substantial decrease in hogs available because of the Government hog extermination program, and including the very substantial increase in labor costs which said N.R.A. program entailed, Vica's costs of production were greatly increased, which factors, in conjunction with the aforementioned cutthroat competition made it impossible for Vica to pass on the burden of these processing taxes to its customers.

The result of all of said factors aforementioned was that Vica, during this period, lost money on its pork department.

Notwithstanding said adverse condition of the pork markets, we had to contrive to produce and sell pork and pork products, even though at a loss, in order to supply our trade. Otherwise, we would have lost a large part of our business of supplying other fresh meats and meat products to our customers. These other branches of our business, involving the slaughter and sale of beef and lamb products were carried on at a profit because our competitors were not able, as in the case of pork, to carry over in storage

beef and lamb supplies. It was physically impossible for them to do this, whereas they could readily do it with pork. As a consequence, they had to buy their beef and lamb day by day, the same as Vica, and on the open market. Consequently, we were substantially on an even ground with them in such departments and were able to make small profits in said departments to offset our losses in the pork department.

That it was likewise impossible for Vica Company to pass any portion of the burden of these processing taxes back to the persons from whom it purchased its hogs because these hogs were purchased day by day on the open market, and the processing taxes were not at all involved in, or considered in connection with, said hog sales.

In said conferences aforementioned with the Commissioner's agents, many detailed facts and records were presented by Vica to said representatives to confirm the aforementioned adverse state of Vica's markets during this tax period." (R. 73-76.)

In connection with the foregoing, it should be borne in mind that the Commissioner and his field agents had ample opportunity to, and undoubtedly did, check and verify all of these statements and this data presented by Vica as to the intense and cutthroat competition confronting it during this tax period, and its inability to pass on to others this tax burden. Complete records of the daily sales in said markets of pork and pork products, and the cost of hogs, dur-

ing this entire tax period were no doubt available to the Commissioner.

The result of all of the aforementioned unfavorable conditions was that Vica Company was unable to pay these processing taxes as they accrued beginning in the year 1933. It just did not have the funds with which to pay these heavy taxes. It did not have these funds because it was unable to pass these taxes on to its customers.

Consequently, it attempted to borrow funds from its San Francisco banks to pay these taxes. During the pendency of these efforts to borrow money to pay these taxes, the local Collector of Internal Revenue caused various tax liens to be filed against Vica and its properties in connection with these delinquent processing taxes which Vica was unable to pay as they accrued. (R. 76-78.) The result of these actions is graphically shown by the record herein:

> "This action of the Collector immediately cut off and destroyed the aforementioned lines of credit previously available to said company. The principal bank which had thus accommodated Vica Company during said period was the Pacific National Bank of San Francisco. * * * Soon after the Collector filed said tax liens against Vica Company, as aforesaid, the president of said Pacific National Bank notified affiant that because of said liens, said bank would no longer extend any credit to Vica. At all times during this period, Vica's principal physical asset was its abbatoirs and packing plant located on a seventeen acre parcel of industrial property at South San

> Francisco, California. Said property was owned in fee by Vica and was free and clear of encumbrances. So long as this condition existed it was quite easy for Vica to secure small unsecured loans and lines of credit at various San Francisco banks. However, when the Collector liened Vica's property, as aforesaid, it became impossible for it to borrow any sums from any bank, even for its normal day to day operations, and as a result a financial crisis was thereby created in the company's affairs." (R. 78.)

To solve this crisis, Vica tried to borrow $300,000 from the Reconstruction Finance Corporation but after months of work on this phase (including sending a representative to Washington, D. C.) this effort ended in failure. The R.F.C. finally concluded that it could not legally lend money to Vica for said purposes. (R. 79.) Incidentally, it might be noted in passing that in its verified application filed with R.F.C. in 1934 (i.e., two years before the invalidation of the A.A.A.) Vica made this very significant statement:

> "As a consequence, when the processing tax came along, Virden Packing Company *was unable to pass it on to the consumer* because large, dominant competitors refused to do so. There was no code and competition continued unregulated and manifestly unfair as the record will show. Virden could not raise prices and *it had to absorb the heavy burden of processing tax.* This it could have done had not the company undertaken the increased burden of additional wages and additional personnel in accordance with President

> Roosevelt's request, and as other costs had not greatly increased at that time." (R. 81.)

When all of these efforts to procure loans had failed, Vica Company, to prevent the complete ruin of its business by these taxes and the action of the Collector in connection therewith, attempted to arrange with the Commissioner of Internal Revenue some plan whereby these accrued taxes could be paid off in installments of $10,000 per month. These negotiations were carried on in the winter of 1934-35 and spring of 1935. Under date of December 14, 1934, it sent to the Commissioner a lengthy report citing facts and figures to demonstrate that if given an opportunity to pay off these taxes in installments, Vica would be able to accomplish this and thereby would be able to protect and preserve this valuable business for its many stockholders. (R. 84-88.) Attention is directed, in passing, to the following significant statements in this report and analysis filed with the Commissioner *long before there was any invalidation of this tax:*

> "Owing to the operations of the A.A.A. and failure to get a packing house market agreement or code, the company was faced with rapidly increasing operating labor, higher priced supplies purchased from industries under code control and higher prices for livestock. The price of hogs reached such a high point that it was impossible to stimulate the demand for pork products to the extent of any more than cost of these products, without the processing tax. The purchasing dollar was not there." (R. 87.)

Finally, however, the Commissioner rejected this appeal of Vica, on April 24, 1935, and notified Vica to arrange with the local Collector for payment of these taxes. (R. 88-89.)

> "That immediately thereafter, the Collector of Internal Revenue at San Francisco demanded immediate payment in full of said processing taxes, and threatened to immediately foreclose the tax liens previously placed against Vica's property, as aforesaid. Because Vica did not have the funds to pay these taxes and could not otherwise procure such funds, it decided to try to quickly sell all its business and assets so as to salvage something for its stockholders. The only alternative was to go into bankruptcy and suffer a complete loss. Affiant and all of the other officers of said company well realized that an immediate sale of such a business could not be effected except at a large sacrifice, but, after careful consideration of all phases, we decided that our only alternative, other than absolute ruin and complete loss, was to sell our said business."

> "Accordingly, and in the month of May, 1935, Vica sold its entire business and all of its assets, including its many old established trademarks and brands and its good will, to Armour & Company, for a total price of $581,795.00, comprising the following items:

Physical properties, etc	$250,000.00
Inventories	202,564.00
Accounts Receivable	129,231.00
	$581,795.00

That the investment made by said company and its many stockholders in establishing and building up this valuable business was many times this purchase price.

That out of this purchase price Vica Company paid the Collector of Internal Revenue the sum of $308,629.00, as payment in full of accrued processing taxes. It was necessary, of course, in connection with this sale that Vica's plant and other property be transferred free and clear of the tax liens previously levied by said Collector. In this connection, Vica sought to have the amount of these processing taxes taken out of this purchase price and held in escrow to await the outcome of the litigation then pending to test the constitutionality of the Agricultural Adjustment Act. The Collector finally agreed to this, but at the last minute the attorneys for the title company through which this sale transaction was closed in escrow, demanded and required that these taxes be paid to the Government. Consequently, Vica was forced to, and did, pay the same concurrently with the closing of said deal and out of its capital assets, as aforesaid. A few months later, the Agricultural Adjustment Act and these taxes were declared unconstitutional." (R. 89-96.)

In short, Vica's valuable business, built up by many years of hard work, and large capital investments, was thus literally wrecked by this illegal processing tax, and the actions of the Collector of Internal Revenue in the enforcement and collection thereof. Notwithstanding all of this, the Commissioner now seeks

to deprive Vica of any opportunity to recover these illegal tax exactions, by resorting to the technicality that some of the statements in its claim for refund were not sufficiently clear and complete!

And, in connection with the foregoing hurried review of the history of this claim and the presentation of evidence to the Commissioner with respect thereto, it should also be borne in mind that Vica Company, in the course of this lengthy presentation, delivered to the Commissioner many specific records and much data to substantiate the foregoing salient facts:

> "To further demonstrate that Vica Company did not and could not pass on the burden of these taxes, we called to the attention of the Commissioner's agents, in said conferences aforementioned, a great many facts, indisputably confirmed by existing records of Vica Company which were exhibited to them and produced for their inspection, including statements made under oath by Vica's representatives in the years 1934 and 1935 (that is, before this processing tax was ever invalidated or any refund applied for) to the effect that Vica was not passing on the burden of this tax and could not do so." (R. 76.)

Attention should also be directed, in this connection, to the detailed schedules attached as Exhibits "C" and "D" to Vica's claim for refund. These schedules clearly set forth the month by month data as to Vica's gross sales, net sales, cost of goods sold, and gross sales profits. Exhibit "C" sets forth this data for the 23 months prior to the time these processing taxes

went into effect (the so-called *pre-tax base period*). Exhibit "D" sets forth the same data for the entire *tax period* of Vica (December, 1933 through May, 1935). A comparison of these data shows that Vica's average margin of gross profit on sales for the *Pre-Tax* period was 9.65% while for the tax period it was only 7.03%. *In short, its margin (on its entire sales) was much less during the tax period than it was during the pre-tax period.* In fact, the differential was substantially *greater than the processing tax* (which was not even considered in fixing the prices for the tax period). Had Vica Company been able to produce figures for the *post-tax period* this disparity would have been even wider because the *post-tax base period* was admittedly one of greater prosperity in this industry and one of much more substantial profit margins than those prevailing in the pre-tax period.

However, notwithstanding the absence of this favorable *post-tax data,* this showing above made by Vica in and by said detailed sales and margin data would be (but for one thing) entirely sufficient, *in and of itself,* to show that it did not pass on the burden of this tax. That one factor is the fact that this data covers *all* of Vica's sales, not merely its pork product sales. In other words, had this data covered only Vica's hog-product sales, Vica's case would have been complete, and the Commissioner could not have escaped allowing its claim in full. Unfortunately, however, for the various reasons detailed in the James affidavit, Vica did not have available any separate records reflecting this data on its hog-product sales. *But it did*

effectively and clearly bridge this gap by showing to the Commissioner by a wealth of other competent evidence that all during this period its hog-products sales were at a loss while its other meat sales were profitable, and that due to the N.R.A. and other factors (higher labor costs, shortage of hogs, etc.), its margin on the pork products was, during the *tax-period,* much less (in fact non-existent) than it had been in the pre-tax period. It also clearly proved that during the tax period it was impossible for it to recover the cost of production of its hog products, let alone add thereto the amount of this processing tax, or any part thereof.

Among the many documentary records submitted by Vica to the Commissioner on this phase, is a report made on *April 3, 1935,* by Vica to the U. S. Department of Agriculture, in connection with an urgent appeal by Vica to the Honorable Henry Wallace (then Secretary of Agriculture), for relief from this ruinous tax. (R. 97-102.) This report is quite illuminating:

> "During the week ending March 16th, our hogs cost $10.98 per cwt. delivered here. Using a 68% yield, these hogs cost us $16.14 per cwt. hanging on our racks, exclusive of labor or plant overhead and with the $2.25 processing tax added, this will bring the cost to $19.45. I am attaching hereto a hog cutting test showing prices charged for the various cuts and the possible yield of each cut making the total selling price $19.84 per cwt. You can readily see that there is absolutely no margin to cover our plant overhead, administrative, and selling expense. * * *"

"There is no question in the minds of the directors of this company that this is an unjust tax and one that should by all means be cancelled. * * *"

"Therefore, I hope in your report to Washington, that you will set forth these figures in such a manner that they will know *we cannot add the tax to our products.*" (R. 100.) (Italics supplied.)

And, in connection with all of the foregoing data as to the proof of the merits of Vica's claim, it must be borne in mind that the Commissioner had ample opportunity and facilities to check, and he no doubt did carefully check on each and every phase of the evidence thus presented by Vica with respect to the merits of its claim. It is very significant, we respectfully submit, that although the Commissioner filed counter-affidavits in the Tax Court purporting to answer the affidavits filed by Vica, *nowhere in his said affidavits does the Commissioner seek to dispute or contradict any of the aforementioned facts; nor any of Mr. James' many and specific statements with respect to the array of evidence and records thus presented by Vica to the Commissioner in support of the merits of Vica's claim.*

But why, one may ask, did the Commissioner disallow this claim in the face of such an array of facts? Petitioner believes the entire answer to this question lies in one simple fact. All during the period of the Commissioner's consideration of Vica's claim, he and his agents constantly insisted and demanded, as a prerequisite to *any* allowance with respect to Vica's

claim, that it supply him with the "marginal data" requested in P. T. Form 79. His representatives told Vica Company, in substance, that without such "marginal data", Vica's claim could not be allowed, irrespective of what other evidence was produced. This attitude on the part of the Commissioner and his agents, as thus orally conveyed to Vica Company, is at least partially exemplified by the following statement in his letter to Vica Company under date of January 31, 1938, viz.:

> "The data as to margins required to be set forth in Schedule D-1 (a) and D-1 (6) were designed to reflect a prima facie presumption as to whether the burden of the tax was borne by you and not shifted to other persons in any manner. In the absence of marginal data, *no prima facie showing can be made as to whether you bore such burden.*" (Exhibit A—R. 136; Italics supplied.)

It is clear from the various letters and statements of the Commissioner that he and his representatives considered this "marginal data" as controlling and conclusive. Likewise evident, we respectfully submit, is the fact that the lower Courts were motivated, in their decision to dismiss this case without a hearing, by the absence of this "marginal proof".

These attitudes of the Commissioner and the lower Courts are, for the various reasons set forth in our accompanying brief, clearly erroneous.